COURT OF APPEALS
DECISION
DATED AND RELEASED

December 4, 1996

NOTICE

No. 96-0169

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

PAUL RINGEISEN
and DAVID COOPER,

Plaintiffs-Appellants,

v.

TOWN OF FOREST, FOND DU LAC
COUNTY, WISCONSIN,

Defendant-Respondent.

APPEAL from an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Paul Ringeisen and David Cooper (collectively, Ringeisen) appeal from an order dismissing their declaratory judgment action against the Town of Forest. Because we agree with the trial court that Ringeisen did not give notice of his claim before commencing his action as required by § 893.80(1)(b), STATS., we affirm.

The dispute arises from the issuance of a conditional use permit for mineral extraction operations on property owned by William Thackray in the Town of Forest. In lieu of seeking rezoning of the property to allow for mineral extraction, an application was made for a conditional use permit for a quarry on part of the property. Ringeisen opposed the permit. On June 6, 1995, at the town board of supervisors (board) meeting on the conditional use permit application, Ringeisen's counsel advised the board that the zoning ordinance granted a separate board of appeals authority to hear and decide conditional use permits and that the town board of supervisors lacked such authority. Ringeisen contends that counsel also stated that legal action would result if the board granted the permit when it lacked authority to do so. The Town disputes this statement and notes that counsel's affidavit in opposition to the Town's motion to dismiss does not state that legal action would be forthcoming if the board acted on the conditional use permit application. The Town board granted a one-year conditional use permit.[1] Ringeisen did not file notices of claim or injury under § 893.80, STATS., before commencing a declaratory judgment action in the circuit court on June 13, 1995.

The Town filed a § 802.06, STATS., motion to dismiss for failure to state a claim supported by the affidavit of the town clerk that no § 893.80, STATS., notices were received prior to the commencement of the declaratory judgment action. Ringeisen then moved for summary judgment with a supporting affidavit from his counsel setting forth what transpired at the June 6, 1995, board hearing. The trial court considered these affidavits. Therefore, both motions are properly considered summary judgment motions. *See* § 802.06(2)(b).

The trial court found that it was undisputed that Ringeisen did not file a written notice of claim or injury under § 893.80, STATS., prior to filing the lawsuit. The court found that counsel's statements to the town board at the June 6, 1995, meeting did not satisfy the notice of claim requirement of § 893.80(1)(b).

[1] In response to this court's October 29, 1996 order, the parties advised that the permit was approved in June but not issued until December 11, 1995.

The court also rejected Ringeisen's claim that § 893.80 does not apply where equitable relief is sought.[2] Ringeisen appeals.

Where both parties seek summary judgment, "the case is put in a posture where the parties waive their right to a full trial of the issues and permit the trial court to decide the legal issue." ***Schunk v. Brown***, 156 Wis.2d 793, 796, 457 N.W.2d 571, 572 (Ct. App. 1990). We apply the well-known summary judgment methodology to each motion. ***Godfrey v. Schroeckenthaler***, 177 Wis.2d 1, 7, 501 N.W.2d 812, 814 (Ct. App. 1993). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. ***Streff v. Town of Delafield***, 190 Wis.2d 348, 353, 526 N.W.2d 822, 824 (Ct. App. 1994).

Section 893.80(1), STATS., provides in pertinent part:[3]

> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employe; and

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[2] A declaratory judgment action is equitable in nature. ***F. Rosenberg Elevator Co. v. Goll,*** 18 Wis.2d 355, 365, 118 N.W.2d 858, 863 (1963).

[3] Section 893.80(1)(b), STATS., was amended by 1995 Wis. Act 158, § 18 (effective April 4, 1996). The amendments do not affect our analysis.

> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any defendant fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

In order to bring an action against a governmental entity, a claimant must give notice of injury under § 893.80(1)(a), STATS., *and* notice of claim under § 893.80(1)(b). ***Vanstone v. Town of Delafield,*** 191 Wis.2d 586, 591-93, 530 N.W.2d 16, 18-19 (Ct. App. 1995). Whether the notice of claim requirement of § 893.80(1)(b) was satisfied in this case presents a question of law which we review de novo. *See* ***DNR v. City of Waukesha,*** 184 Wis.2d 178, 197, 515 N.W.2d 888, 895 (1994).

The notice of claim component requires, in part, an itemized statement of the relief sought, presentation to the appropriate clerk or person who performs the duties of a clerk or secretary for the municipality, and the municipality's allowance or disallowance (by the passage of 120 days without action) of the claim before commencing an action. ***Id.*** at 199-200, 515 N.W.2d at 896-97. Ringeisen argues that he gave notice of claim by virtue of counsel's statements to the town board that it was without authority to consider or grant a conditional use permit and that when the Town granted the permit, his claim was denied, thereby setting the stage for a declaratory judgment action in the circuit court. Ringeisen further argues that the minutes of the June 6 meeting constitute the written notice contemplated by § 893.80(1)(b), STATS.

The minutes of the June 6, 1995, meeting of the town board are not in the record on appeal. Furthermore, neither party cites to those minutes. Therefore, we have only the affidavit of Ringeisen's counsel in opposition to the motion to dismiss setting forth counsel's claim as to what he said to the board at the June 6 meeting.

We conclude that counsel's comments to the board do not satisfy the notice of claim provision. They are not an itemized statement of the relief sought because there is no evidence in the record that counsel stated the type of relief he would seek in circuit court. Even if counsel threatened unspecified legal action, which may be a disputed fact,[4] such would have been insufficient as a notice of claim for the reason previously stated. Merely intimating the possibility of legal action is insufficient. *See* ***Vanstone***, 191 Wis.2d at 596, 530 N.W.2d at 20.

We also reject Ringeisen's contention that the provisions of § 893.80, STATS., do not apply where equitable relief is sought. *See* ***DNR,*** 184 Wis.2d at 191, 515 N.W.2d at 893 ("§ 893.80 applies to all causes of action ... and not just those for money damages"); *see also* ***Vanstone,*** 191 Wis.2d at 596, 530 N.W.2d at 20.

In seeking declaratory relief, Ringeisen subjected himself to the need to comply with § 893.80, STATS. Because he failed to comply with the para. (1)(b) notice of claim requirement, Ringeisen's claim was properly dismissed by the trial court.[5]

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[4] A request for summary judgment is not defeated by the mere presence of conflicting facts. In order to avoid summary judgment, the conflict must be determinative of the question, ***Dahlke v. Dahlke***, 25 Wis.2d 559, 568A, 131 N.W.2d 362, 132 N.W.2d 584, 584 (1965) (per curiam on motion for rehearing), and must be material to the question of law presented, ***DeBonville v. Travelers Ins. Co.***, 7 Wis.2d 255, 260, 96 N.W.2d 509, 512 (1959).

[5] Alternative legal remedies may be available. For example, a petition for writ of mandamus to compel the performance of an alleged plain legal duty imposed by the zoning ordinance with regard to the existence and function of a town board of appeals might be possible. *See* ***State ex rel. Lewandowski v. Callaway,*** 118 Wis.2d 165, 171, 346 N.W.2d 457, 460 (Ct. App. 1984) (elements of mandamus discussed); *see also* ***Elkhorn Area Sch. Dist. v. East Troy Community Sch. Dist.,***

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

(..continued)
127 Wis.2d 25, 30-31, 377 N.W.2d 627, 630 (Ct. App. 1985) (§ 893.80, STATS., inapplicable to mandamus actions). Additionally, common law certiorari may be possible on the ground that the town board allegedly exceeded its authority when it acted on the conditional use permit. *See* ***Miswald v. Waukesha County Bd. of Adjustment,*** 202 Wis.2d 402, 411-12, 550 N.W.2d 434, 437 (Ct. App. 1996).